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No. 02-

In the Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Petitioners,

v.

NATHANIEL TRULL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under Federal Rule of Civil Procedure 49, a party waives its objection to the entry of judgment in a manner inconsistent with the jury's finding on a mixed question of law and fact by failing to note the inconsistency before the jury is discharged.

2. Whether, under Federal Rule of Civil Procedure 51, a defendant's failure to object to the submission of a case to the jury on multiple liability theories waives a subsequent argument that the jury's findings on those theories are inconsistent.

PARTIES TO THE PROCEEDING AND STATEMENT UNDER RULE 29.6

The petitioners are Volkswagen of America, Inc. and Volkswagen, AG. The respondents are Nathaniel Trull, PPA David Trull and David Trull, Administrator of the Estate of Benjamin Trull.

Volkswagen of America, Inc., has a parent, Volkswagen Beteiligungs-Gesellschaft mbh, which is a wholly-owned subsidiary of Volkswagen, AG. No publicly held company owns ten percent or more of Volkswagen, AG's stock.

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PETITION FOR A WRIT OF CERTIORARI

Volkswagen of America, Inc. and Volkswagen, AG ("Volkswagen") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the district court (App., *infra*, 19a-29a) is unreported. The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 320 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2002. App., *infra*, 32a-33a. A timely petition for rehearing was denied on February 11, 2003. *Id.* at 30a-31a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the construction of Rules 49 and 51 of the Federal Rules of Civil Procedure, which are reproduced at App., *infra*, 47a-48a.

STATEMENT

In this product liability action, plaintiffs' claims under both their strict liability and negligence theories depended upon proof that Volkswagen had manufactured a vehicle that was defective in design. At the conclusion of the trial, the jury made an express and unequivocal finding in the "special verdict" forms that the vehicle did *not* have the claimed design defect. In contravention of the jury charge and the applicable law, however, the jury also found that Volkswagen had been negligent in manufacturing the vehicle. Rejecting Volkswagen's argument that it could not be held liable under

any theory without proof of a design defect, the district court entered a $10 million judgment against Volkswagen based on the negligence finding. The court of appeals refused to entertain Volkswagen's contention that the jury's findings were irreconcilably at odds, concluding that Volkswagen had waived its objections to the verdict inconsistency – first, by failing to object to the submission of overlapping liability theories to the jury and, second, by failing to note the inconsistencies within the verdict before the jury was discharged.

Both grounds for the First Circuit's waiver determination are the subject of persistent conflicts among the courts of appeals. Although Rule 49 verdict forms are commonly employed to lend clarity to the jury's determinations in complex cases, courts disagree about the most basic aspects of practice under the Rule, and these differences often determine the outcome of cases. Because it chose to apply a stringent waiver rule, the court below refused even to consider the effect of the jury's "no-defect" finding in this case, a dispositive event under New Hampshire law. But most other courts *would* have reached the merits of Volkswagen's challenge to the entry of judgment. These courts do *not* require defendants to object to the submission of alternative theories that may result in inconsistencies, nor do they insist that parties point out inconsistencies of this type before the jury is discharged.

The current treatment of Rule 49 frustrates the goal of national uniformity in federal practice. Unless this Court intervenes, a regular feature of federal jury trials will remain a source of confusion, inefficiency, and injustice. Review of the decision below clearly is warranted.

1. In February 1991, David and Elizabeth Trull and their two sons, Nathaniel and Benjamin, were driving in New Hampshire when their 1986 Volkswagen Vanagon slid on black ice and collided with another vehicle. Benjamin died, Elizabeth suffered severe brain injuries, and Nathaniel suffered a head injury. Nathaniel and Benjamin were seated in the rear middle

seat of the Vanagon, which was equipped with lap-only belts. The front seat, where Elizabeth was seated, had combination lap/shoulder belts. R. 620-625.

In January 1994, David Trull, on behalf of Benjamin's estate and Nathaniel, sued Volkswagen in the United States District Court for the District of New Hampshire, invoking the court's diversity jurisdiction. Plaintiffs contended that the 1986 Vanagon had been defectively designed because it was equipped with lap-only belts in the rear seats and that Nathaniel's and Benjamin's injuries were more severe than they would have been had their seats been equipped with combination lap/shoulder belts.

Following a trial, a jury returned verdicts for defendants, and the plaintiffs appealed. The court of appeals rejected plaintiffs' other challenges to the judgment, but it certified to the New Hampshire Supreme Court a question regarding which party bears the burden of apportioning the injuries attributable to the manufacturer in a crashworthiness case. *Trull* v. *Volkswagen of Am., Inc.*, 187 F.3d 88, 103 (1st Cir. 1999). After the New Hampshire Supreme Court ruled that the burden of apportioning injury shifts to the defendant after the plaintiff demonstrates that a design defect contributed to an increase in his or her injuries from a collision (*Trull* v. *Volkswagen of Am., Inc.*, 761 A.2d 477, 482 (N.H. 2000)), the First Circuit concluded that the district court's instructions on that issue were erroneous and remanded the case for a new trial. *Trull* v. *Volkswagen of Am., Inc.*, 229 F.3d 343 (1st Cir. 2000).

2. The second trial commenced on April 3, 2001. As the court of appeals later recognized, "[t]he evidence was essentially the same as to both theories of liability." App., *infra*, 2a. To establish both strict liability and negligence, plaintiffs relied on the testimony of their experts (strongly contested by defendants) that combination lap/shoulder belts in rear seats provide more safety in an accident than lap-only belts and that the availability of lap/shoulder belts in the rear seat

would have decreased the severity of the boys' injuries in this case.

The district court itself crafted the jury instructions. Consistent with plaintiffs' wishes and with state law establishing that "[a] strict liability action based upon a theory of defective design may be joined with an action grounded in negligence" (*Trull*, 761 A.2d at 481), the court instructed the jury on both theories of liability. In light of the New Hampshire Supreme Court's ruling *in this very case* a few months before trial that plaintiffs could rely on both theories (*ibid.*), and since asserting the contrary would be legally erroneous, Volkswagen did not object to this aspect of the instructions, which stated that the jury could find in favor of plaintiffs on strict liability *or* negligence. App., *infra*, 37a-38a. Volkswagen considered its interests to be protected by other parts of the jury charge, which made it clear that Volkswagen could not be held liable under *either* theory unless the jury concluded that the use of lap-only belts in the rear seats rendered the Vanagon defective in design.

For example, the instructions described plaintiffs' negligence claim as contending that defendants' lack of due care "resulted in *the claimed defect* in the vehicle; namely, the vehicle lacked lap/shoulder belts in the rear seating positions." *Id.* at 41a (emphasis added). In addition, the proximate cause instruction regarding negligence specified that "[i]f the injury would have occurred anyway without any defect in the design of the vehicle, then *the design defect* would not be a proximate cause of the injury." *Id.* at 43a (emphasis added).

Furthermore, the district court instructed the jury that "plaintiffs *both under their strict liability and negligence claims*, have the burden of proving by a preponderance of the evidence that *the claimed design defect* was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision." App., *infra*, 44a (emphasis added). Similarly, with respect to the order of proof, the court stated:

> With respect to each plaintiff, first you will determine if the plaintiff has met his burden of proving by a preponderance of the evidence under his claim of strict liability or negligence that *the claimed design defect* was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision. If the plaintiff fails to meet his burden on both claims, you will conclude your deliberations.

Id. at 45a (emphasis added).[1]

After giving the instructions, the district court submitted to the jury, for each plaintiff, a three-page document entitled "Special Verdict Form." App., *infra*, 34a-36a. The verdict forms, like the jury instructions, were crafted by the court itself. Each form included the following seven questions:

> Strict Liability
>
> 1. Do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating position?
>
> _____
> (Yes or No)
>
> (If you answered "Yes" to question 1, answer question 2.)
>
> (If you answered "No" to question 1, go to question 3.)[2]
>
> 2. Do you find by a preponderance of the evidence that the defective condition caused, or substantially caused, injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

---

[1] Indeed, the instructions bearing on the negligence count include no fewer than 17 references to the concept of design defect. App., *infra*, 37a-46a.

[2] These directions on the verdict form appeared in much smaller type than the questions themselves.

_____
(Yes or No)

Negligence

3. Do you find by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions?

_____
(Yes or No)

(If you answered "Yes" to question 3, answer question 4.)

(If you answered "No" to question 3, skip question 4 and go to the bottom of this page for further instructions.)

4. Do you find by a preponderance of the evidence that the defendant's negligence in designing and testing the 1986 Vanagon caused or contributed to cause the injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

_____
(Yes or No)

Further Instructions

If you have answered "Yes" to question 1 *and* question 2, and/or question 3 *and* question 4, then proceed to question 5.

Otherwise, conclude your deliberations.

Allocation of Injuries

5. Do you find that the defendant has proved by a preponderance of the evidence which injuries were attributable to the initial collision and which to the design defect?

_____
(Yes or No)

Damages – Answer Question 6 *or* Question 7, as appropriate.

6. Assess the total amount of damages sustained by Nathaniel Trull as a result of the accident in question.

_____

(Words, not figures.)

7. Assess the amount of damages sustained by Nathaniel Trull during the accident in question which are attributable to the design defect.

_____

(Words, not figures.)

The jury returned its verdict on April 20, 2001, in a court session that lasted a total of ten minutes. The judge greeted the jurors, read the verdicts silently to himself, and then had the clerk read both special verdict forms aloud. R. 2502. On both verdict forms, the jury had answered "no" to Question 1; had not answered Question 2; had answered "yes" to Questions 3 and 4; and had answered "no" to question 5. In its answers to question 6, the jury indicated that as the result of the accident Nathaniel Trull sustained damages of $8,917,335.27 and that Benjamin Trull's estate sustained damages of $1,290,980.70. The jury did not answer question 7, which asked the jury to specify the damages "which are attributable to the design defect."

The district court then asked the jurors to confirm that the verdicts were unanimous and instructed the clerk "to enter judgment in accordance with the special findings of the jury." R. 2505. Thereafter, without addressing counsel or granting them the time to consider the jury's answers, the court thanked and dismissed the jurors and immediately left the courtroom. *Ibid.*

After having the opportunity to review and consider the verdicts, Volkswagen concluded that the jury's "no" response to question 1 on the verdict form (the only question explicitly and directly asking the jury whether there was a design defect)

was inconsistent with the entry of judgment against Volkswagen. Under the instructions and New Hampshire law, the jury was not permitted to find Volkswagen liable under *either* strict liability *or* negligence unless it concluded that the vehicle had a design defect that exacerbated the plaintiffs' injuries. By giving a negative answer to question 1, the jury had made a factual finding that the 1986 Vanagon did *not* have a design defect. In these circumstances, the jury's finding in response to question 3 that Volkswagen was negligent in designing and/or testing the vehicle could not support the entry of judgment against Volkswagen, because the jury had already concluded that any lapse in due care *had not resulted in the creation of a defective vehicle*.[3]

Accordingly, Volkswagen filed a motion for judgment or a new trial. The district court denied the motion, concluding without any explanation whatsoever that the jury's responses to the questions were not inconsistent. App., *infra*, 20a. It also ruled that Volkswagen had waived its right to challenge any inconsistency in two ways – first, by failing "to object to the appropriateness of instructing the jury on the two theories of liability" (*id.* at 21a), and, second, by failing to bring the inconsistency to the court's attention before the jury was discharged. *Ibid.*

---

[3] At the same time, the jury's finding that the vehicle did not have a design defect was *consistent* with its responses to questions 5, 6, and 7. The jury's conclusion that there was no defect would have precluded any finding in response to question 5 that Volkswagen had proven "which injuries were attributable to the initial collision and which to the design defect," and would have made it impossible for the jury to answer question 7, which asked the jury to specify "the amount of damages sustained by [each boy] during the accident in question which are attributable to the design defect." App., *infra*, 36a. But it would not have prevented the jury from assessing, in its answers to question 6, the "total amount of the damages sustained * * * as the result of the accident." *Ibid.*

3. The First Circuit affirmed. The court of appeals first held that "VW's failure to follow the applicable Rule of Civil Procedure bars its appeal." App., *infra*, 4a. Ignoring the fact that the district court and the parties had repeatedly characterized the verdicts in this case as Rule 49(a) special verdicts, as well as the fact that no single question on the verdict form called for an ultimate finding of liability, the court of appeals concluded that questions 1 and 3 "were general verdict forms under Rule 49(b)." *Id.* at 5a. Citing its prior rulings that "under Rule 49(b), objections to the inconsistency of verdicts must be made after the verdict is read and before the jury is discharged" (*ibid.*), the court concluded that "VW forfeited its objection to the alleged inconsistency by failing to object at any time prior to the jury's discharge." *Ibid.*

The court of appeals also held that Volkswagen gave up its right to raise the inconsistency by failing to object to the jury instructions, which "made it clear that the jury was to be asked to decide the issue of liability on both the theory of strict liability and the theory of negligence." App., *infra*, 6a. In the court's view, "a failure to object as required by Rule 51 deprives the non-objecting party of review under Rule 61, either before the trial court on a post-trial motion or on appeal." *Ibid.*

In a similar vein, the court of appeals concluded that, because Volkswagen "did not object to the verdict forms at any time prior to their submission to the jury," it had "waived its right to object to any foreseeable combination of proper responses to the questions posed on the verdict forms." App., *infra*, 4a. The court rejected Volkswagen's argument that it should not have been required to object *before* the submission of the case to the jury because "the verdicts did not become inconsistent until after the jury had completed them." *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

General verdicts "simply ask the jury to answer the question 'who won,' and if the winning party is entitled to a monetary

award, to answer the question 'how much.'" *Turyna* v. *Martam Constr. Co., Inc.*, 83 F.3d 178, 181 (7th Cir. 1996). To focus the jury's attention on the key issues and elucidate its reasoning, federal district courts may employ two alternatives to the general verdict. Under Rule 49(a), the court may submit a "special verdict in the form of a special written finding upon each issue of fact." Fed. R. Civ. P. 49(a). Alternatively, under Rule 49(b), the court may submit, "together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." Fed. R. Civ. P. 49(b).

When things go as intended, Rule 49 verdict forms can assist trial and appellate courts "in directing a comprehensive, final disposition to the case without infringing in the slightest upon the inviolate nature of the jury trial and resolution." Hon. Brown, J., *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 347 (1967)). Sometimes, however, the jury's answers to the questions on a verdict form conflict with one another and do not unequivocally support judgment for either party. Because such inconsistencies occur with some regularity, one would expect the federal courts to have developed clear rules for dealing with them. In fact, the courts appear to have given up hope of any kind of uniformity. The case law regarding verdict inconsistencies has become a minefield, riddled with conflicts and fraught with the risk of inadvertent waiver of substantive rights.

First, the courts of appeals disagree about what defendants must do to raise and preserve their objections to the jury's inconsistent responses to verdict questions. There is a well-established conflict among the circuits concerning whether a party waives any objection based on verdict inconsistency unless it is raised *before* the jury is discharged. Because in many circuits the answer depends upon whether the verdict is governed by Rule 49(a) or Rule 49(b), that question raises a subsidiary, and even more fundamental, conflict: the circuits do not agree about which sorts of verdict forms are "special

verdicts" governed by Rule 49(a) and which are "general verdicts with interrogatories" governed by Rule 49(b).

Second, there exists a significant conflict regarding the obligation to object to the submission of multiple liability theories that may result in inconsistent verdicts. Several courts have ruled that the defendant must object to having the jury instructed on multiple, overlapping legal theories or waive its right to challenge inconsistencies in the jury's findings on those theories. Other courts, however, have routinely addressed this common type of verdict inconsistency without imposing such an extraordinary waiver rule.

This case cleanly presents each of these conflicts. Despite the fact that they were labeled "special verdicts" and that the parties and the district court plainly regarded them as such, the court of appeals decided after the fact that the verdict forms were "general verdicts" governed by Rule 49(b). Having thus recharacterized the verdict forms, the court ruled that Volkswagen was required to point out the inconsistencies within the verdicts *before* the jury was discharged. Most other courts, however, treat similar verdict forms as "special verdicts" governed by Rule 49(a) and will consider objections to such verdicts that are raised *after* the jury is discharged.

The court of appeals also held that Volkswagen waived its right to challenge the inconsistency within the verdicts because it had not objected to the instruction of the jury on both strict liability and negligence theories. The court applied this waiver doctrine despite the fact that the submission of both counts was plainly permissible under New Hampshire law and that any objection not only would have been futile but would have relied on an incorrect assertion of applicable law. In so ruling, the court was in a distinct minority: only one other circuit places the burden on defendants to predict and seek to forestall verdict inconsistencies. Most federal courts recognize that, where state law gives the plaintiff the prerogative to submit overlapping theories to the jury, the *plaintiff* bears the risk that the jury's findings on those theories will conflict. In contrast to the

decision below, these courts do not deprive defendants of their ability to challenge inconsistent verdicts merely because they acceded to the plaintiffs' permissible trial strategy.

The issues presented by this case are both significant and recurring. The confusion and disagreement regarding the proper characterization of Rule 49 verdicts and the timing of objections have plagued federal trial practice for years, creating substantial inefficiencies and leading frequently to the forfeiture of substantive rights. These issues have the potential to arise in every federal case in which a Rule 49 verdict form is used and have been addressed in scores of published decisions, which have nonetheless failed to resolve the confusion. It is clear by now that no degree of uniformity – a principal goal of the Federal Rules of Civil Procedure – will ever be achieved without this Court's intervention.

The conflict regarding the defendants' obligation to point out *possible* inconsistencies *before* the verdict is submitted also merits the Court's attention. Applying state law in diversity cases, most federal courts routinely permit plaintiffs to send their cases to the jury on overlapping theories such as strict liability, breach of warranty, and negligence. Requiring defendants to object to this practice, or sacrifice their right to object to any resulting inconsistencies, places federal procedure squarely at odds with state substantive law. Indeed, it forces defendants to make objections asserting incorrect statements of law – a burlesque that elevates mistaken form over substance. Moreover, the imposition by a few circuits of this harsh and demanding waiver rule makes the outcome of cases depend on where they have been filed. To correct this gross departure from uniformity in federal procedure, review of this case clearly is warranted.

I. THERE IS A CONFLICT IN THE CIRCUITS REGARDING WHETHER, AND UNDER WHAT CIRCUMSTANCES, A PARTY MUST OBJECT TO AN INCONSISTENCY IN A RULE 49 VERDICT BEFORE THE JURY IS DISCHARGED

As a leading treatise has noted, there has been "much litigation and disagreement among the circuit courts as to the prerequisites for preserving objections to inconsistencies"in a jury verdict. 9 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 49.02[2][d] (3d ed. 1997). There is a mature split among the courts of appeals on the question whether a party seeking to challenge a verdict as inconsistent must do so before the jury is discharged. According to many courts, the rule differs depending on whether the verdict is characterized as a special verdict governed by Fed. R. Civ. P. 49(a) or as a general verdict with interrogatories governed by Fed. R. Civ. P. 49(b). See, *e.g.*, *Simmons* v. *City of Phila.*, 947 F.2d 1042, 1057-1058 (3d Cir. 1991); *Bonin* v. *Tour W., Inc.*, 896 F.2d 1260, 1262-1263 (10th Cir. 1990). Yet distinguishing one type of verdict from the other also has confused and divided the courts. This case presents an opportunity for the Court to resolve these festering disagreements.

A. The Case Presents An Important And Recurring Issue Concerning The Distinction Between Rule 49(a) Special Verdicts And Rule 49(b) General Verdicts With Interrogatories, As To Which There Is A Conflict Among The Circuits

The procedures for handling inconsistencies in Rule 49 verdicts depend on whether they are governed by Rule 49(a) or Rule 49(b). When inconsistencies arise within a special verdict under Rule 49(a), this Court has explained that the court must attempt to harmonize the jury's answers and enter judgment accordingly. See *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963) ("it is the duty of the courts to attempt to harmonize the answers"); *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines Ltd.*, 369 U.S.355, 364 (1962) ("[w]here there

is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way"). If harmonization is impossible, the court must order a new trial. See, *e.g.*, *Brooks* v. *Brattleboro Mem'l Hosp.*, 958 F.2d 525, 529-530 (2d Cir. 1992); *Riley* v. *K Mart Corp.*, 864 F.2d 1049, 1054-1055 (3d Cir. 1988).

Unlike Rule 49(a), Rule 49(b) expressly prescribes the proper course when inconsistencies appear in a general verdict with interrogatories:

> When the answers [to interrogatories] are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdicts or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Fed. R. Civ. P. 49(b).

Thus, the proper manner of addressing inconsistencies depends in material respects on whether a special verdict or a general verdict with interrogatories is involved. Moreover, as noted above, in many circuits the form of the verdict determines *when* a party must object to any inconsistencies. If these rules are to be applied sensibly and predictably, both the district court and the parties obviously need to understand what type of verdict they are dealing with.

Nevertheless, the courts of appeals have admitted to a surprising degree of confusion about how to tell one sort of verdict from the other. See, *e.g.*, *Mason* v. *Ford Motor Co.*, 307 F.3d 1271, 1274-1275 (11th Cir. 2002) ("Categorizing a verdict as a general verdict, or as a special verdict under Rule 49(a), or as a general verdict with special interrogatories under

Rule 49(b) should be – but too often seems not – a simple matter."); *Turnya*, 83 F.3d at 179 (the "case was submitted to the jury on a form that wasn't quite a general verdict form, but wasn't special verdicts under Federal Rule of Civil Procedure 49(a) or a general verdict with interrogatories under Rule 49(b) either"); *Loughman* v. *Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 104 n.16 (3d Cir. 1993) ("as in many cases, it is not entirely clear whether the verdict is governed by Fed. R. Civ. P. 49(a) or 49(b)"); *Arachnid, Inc.* v. *Medalist Mktg. Corp.*, 972 F.2d 1300, 1303 n.3 (Fed. Cir. 1992) ("The distinction between special verdicts and special interrogatories is unclear."); *Putnam Res.* v. *Pateman*, 958 F.2d 448, 455 (1st Cir. 1992) ("the record is unclear as to whether the case was given to the jury under Rule 49(a) or 49(b)"). Indeed, there is no agreement over whether even the most common sorts of verdict forms are governed by Rule 49(a) or Rule 49(b).

In particular, the issue of whether a series of mixed questions of law and fact is governed by Rule 49(a) or Rule 49(b) has confused and divided the courts of appeals. In conflict with the decision below, the Third, Fourth, Fifth and Tenth Circuits have determined that verdict forms that contain mixed questions of law and fact, but that do not ask the jury to make an ultimate finding of liability, are special verdicts governed by Rule 49(a). See, *e.g.*, *Simmons*, 947 F.2d at 1057 ("special verdicts under Rule 49(a) may * * * constitute findings of fact that actually blend factual with legal conclusions"); *McCollum* v. *Stahl*, 579 F.2d 869, 870-871 (4th Cir. 1978) (concluding that questions asking jury to determine whether defendant discharged plaintiff "wrongfully" and whether the discharge was "maliciously, wantonly, or oppressively done" comprised a special verdict under Rule 49(a)); *Costilla* v. *Aluminum Co. of Am.*, 826 F.2d 1444, 1446, 1448 n.6 (5th Cir. 1987) (concluding that a series of questions asking the jury to make findings regarding design defect, negligence, proximate causation, and damages comprised a Rule 49(a) special verdict); *Alvarez* v. *J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1039 & n.1 (5th Cir. 1982)

(interrogatories regarding negligence, unseaworthiness, causation and damages were submitted under Rule 49(a)); *Bonin*, 896 F.2d at 1262-1263 (questions regarding negligence, proximate causation, and damages submitted under Rule 49(a)). In contrast, the Second Circuit, like the First Circuit, has ruled that verdict forms such as the ones employed in this case are governed by Rule 49(b). See *Jarvis* v. *Ford Motor Co.*, 283 F.3d 33, 56 (2d Cir.), cert. denied, 123 S. Ct. 539 (2002).

The decision below is a prime example of the complete unpredictability of decisions on this issue. Here, the verdict forms were labeled as "special verdicts," and the parties and the district court all referred to them as such. Each verdict form contained seven mixed questions of law and fact pertinent to Volkswagen's liability, but did not seek a general determination that Volkswagen was or was not liable. Accordingly, there was no question on either form that satisfied the widely accepted definition of "general verdict." See BLACK'S LAW DICTIONARY 1555 (7th ed. 1999) (in rendering a general verdict, the jury simply "finds in favor of one party or another, as opposed to resolving specific fact questions").

Ignoring the conventional understanding of the term – and giving no weight whatsoever to what the parties and the district court considered the forms to be – the First Circuit nevertheless concluded that questions 1 and 3 were "general verdicts" on strict liability and negligence, respectively. That conclusion is wholly mysterious. Those two questions asked for findings as to whether the vehicle had the claimed design defect and whether Volkswagen had been negligent in the design or testing of the vehicle; they did not address other elements of liability including, most crucially, whether the purported defect and/or negligence caused or exacerbated the plaintiffs' injuries.[4]

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[4] As the district court explained in its instructions, Volkswagen could not be held liable in this "crashworthiness" case unless the jury concluded that "the claimed design defect was a substantial factor in producing injuries over and above those which were probably caused

Accordingly, affirmative answers to those questions were incapable, standing alone, of constituting findings that Volkswagen was liable and thus comprising "general verdicts."

Moreover, the First Circuit's decision, after the fact, to recharacterize what had been called "special verdicts" as "general verdicts" raises serious fairness concerns. In contrast, in determining whether Rule 49(a) or Rule 49(b) governs the proceedings, the Ninth Circuit has recognized that it is improper to recharacterize a verdict retroactively and has given great weight to what the district court and the parties *called* the verdict form. See *Floyd* v. *Laws*, 929 F.2d 1390, 1396 (9th Cir. 1991) (holding that the interrogatories to the jury "constituted a special verdict, simply because that is what the trial court declared them to be"). The First Circuit's failure to recognize the importance of this factor provides an additional reason to review its decision.

B. This Case Presents The Issue Of Whether, And Under What Circumstances, A Party Must Point Out Inconsistencies In A Verdict Before The Jury Is Discharged

The First Circuit's decision also exacerbates the well-established conflict among the circuits regarding the preservation of objections to verdict inconsistencies. Some circuits require that verdict inconsistencies be raised before the jury is discharged, but others do not. In some circuits, such an objection must be made when the verdict falls under Rule 49(b) – which expressly permits re-submission of the case to the jury in certain circumstances – but not when the verdict has been

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as a result of the original collision. " App., *infra*, 44a. That key issue was addressed by separate questions 2 and 4. In deciding that questions 1 and 3 were general verdicts, the court of appeals seemed to ignore the very existence of these other questions. Indeed, the court below indicated that "there were no written interrogatories submitted to the jury." *Id.* at 5a. It is unclear what importance, if any, the court assigned to questions 2, 4, 5, 6, and 7.

issued under Rule 49(a). See, *e.g.*, *Bonin*, 896 F.2d at 1263. The waiver rule can be quite harsh, allowing entry of judgment *for the wrong side* because counsel did not object in the few moments after the verdict was read and before the jury was released. Such a rule, if appropriate, at least should be applied uniformly and consistently. Granting certiorari in this case would give the Court the opportunity to address this significant divergence in federal procedure.

When inconsistencies appear within a special verdict rendered under Rule 49(a), the Second, Third, Fourth, Fifth, Ninth, and Tenth Circuits have held that a party may seek relief without raising an objection before the jury is discharged. See *Auwood* v. *Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890-891 (2d Cir. 1988); *Simmons*, 947 F.2d at 1057; *Ladnier* v. *Murray*, 769 F.2d 195, 198 n.3 (4th Cir. 1985); *Alvarez*, 674 F.2d at 1040-1041; *Pierce* v. *Southern Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987); *Resolution Trust Corp.* v. *Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993). These courts apparently accept the view that "[t]he legal error resulting from the entry of a judgment based on inconsistent special interrogatories is one which undermines the validity and integrity of the judgment and may, in fact, run afoul of the Seventh Amendment by allowing the District Court to usurp the jury's function." *Mercer* v. *Long Mfg. N.C., Inc.*, 671 F.2d 946, 948 n.1 (5th Cir. 1982); see also *Ladnier*, 769 F.2d at 198 n.3 (citing *Mercer*); *Auwood*, 850 F.2d at 890-891 ("proper deference to the parties' Seventh Amendment rights to a jury trial precludes entry of a judgment that disregards any material jury finding").

On the other hand, the Eleventh Circuit requires that objections to inconsistencies in a Rule 49(a) special verdict be made before discharge of the jury. See, *e.g.*, *Golub* v. *J.W. Gant & Assocs.*, 863 F.2d 1516, 1521 n.4 (11th Cir. 1989); *Mason*, 307 F.3d at 1274 n.4 (acknowledging conflict on this issue between pre-1981 Fifth Circuit precedent and later decisions of the Eleventh Circuit, but concluding that "we can leave to

another day the task of untangling these seemingly inconsistent special verdict precedents"). The First Circuit has required pre-discharge objections without distinguishing between Rule 49(a) and Rule 49(b) (see, *e.g.*, *Skillin* v. *Kimball*, 643 F.2d 19, 20 (1st Cir. 1981)) and has imposed the waiver rule in a few cases involving Rule 49(a) (see, *e.g.*, *Bonilla* v. *Yamaha Motor Corp.*, 955 F.2d 150, 152 n.2, 155-156 (1st Cir. 1992)). Nevertheless, the court below expressly tied its finding of waiver to its conclusion that the verdicts were governed by Rule 49(b) (App., *infra*, 4a-5a), suggesting that it might have decided the issue differently had it concluded that Rule 49(a) applied.

The balance of authority differs when a verdict is rendered under Rule 49(b). Most courts that have addressed the issue, including the First, Fourth, Fifth, Seventh and Tenth Circuits, have held that objections involving inconsistencies in Rule 49(b) verdicts must be raised before the discharge of the jury. See *Fernandez* v. *Chardon*, 681 F.2d 42, 58 (1st Cir. 1982), aff'd on other grounds, 462 U.S. 650 (1983); *Austin* v. *Paramount Parks, Inc.*, 195 F.3d 715, 726 (4th Cir. 1999); *Stancill* v. *McKenzie Tank Lines Ltd.*, 497 F.2d 529, 534-535 (5th Cir. 1974); *Cundiff* v. *Washburn*, 393 F.2d 505, 507 (7th Cir. 1968); *Diamond Shamrock Corp.* v. *Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1422-1433 (10th Cir. 1986).

Other courts, however, have ruled that the obligation to address an inconsistency within a Rule 49(b) verdict is not contingent on any party's objection. In *Los Angeles Nut House* v. *Holiday Hardware Corp.*, 825 F.2d 1351 (9th Cir. 1987), the Ninth Circuit found that a waiver rule – which "permits the party in whose favor the general verdict runs to prevail merely by remaining silent" (*id.* at 1354) – is "inconsistent with the language and structure of Rule 49(b)." *Ibid.* (internal citations omitted).[5] The Second Circuit has similarly concluded that "the

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[5] As noted above, Rule 49(b) gives preference to specific over general findings: it allows the court to disregard a general verdict that contradicts the jury's answers to interrogatories on issues of fact, but

terms of Rule 49(b) make it the responsibility of a trial judge to resolve the inconsistency even when no objection is made." *Schaafsma* v. *Morin Vt. Corp.*, 802 F.2d 629, 634 (2d Cir. 1986) (internal citation and quotation marks omitted).

The decision below squarely frames this multi-faceted conflict. Some courts – including at least the Third, Fourth, Fifth and Tenth Circuits – would treat the verdict forms here as special verdicts submitted under Rule 49(a). Because these courts do not require inconsistencies in such verdicts to be raised before the jury is discharged, they would not have found that, by failing to make such an objection, Volkswagen waived its right to object to the entry of judgment for plaintiffs. The Ninth Circuit, similarly, does not require pre-discharge objections to the entry of judgment inconsistent with a factual finding by the jury. See *Pierce*, 823 F.2d at 1370 (Rule 49(a) "does not require objections before discharge of the jury"); *Los Angeles Nut House*, 825 F.2d at 1356 (waiver rule that would "permit the wrong party – the one favored by the jury's general verdict – to obtain a judgment * * * is not a sensible reading of Rule 49(b)"). In contrast, because it appears to require pre-discharge objections to inconsistencies for *all* types of Rule 49 verdicts, the Eleventh Circuits might well have agreed with the First Circuit and found waiver in this case.

C. These Conflicts Recur Frequently And Create Substantial Inefficiencies

These conflicts in the application of Rule 49 are both significant and recurring. The issues at stake have the potential to arise in every jury trial in federal court, and they frequently determine the outcome of cases. The need for clear and consistent rules in this area is substantial.

First, the absence of uniformity regarding the obligation to raise objections to inconsistent verdicts creates great

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does not authorize the entry of judgment in a manner that conflicts with one of the jury's responses to factual interrogatories.

inefficiency. To avoid forfeiture of their clients' rights, attorneys practicing in federal courts across the country must learn and follow a multiplicity of different local constructions of Rule 49. Not only must they determine for each type of verdict whether an objection before jury discharge is necessary to preserve a claim of verdict inconsistency, but they also must research local decisions in an effort to discern whether a particular form of verdict will be deemed a special verdict or a general verdict with interrogatories. Even within some circuits, the decisions are so inconsistent that it is impossible to predict how a court will view a particular verdict form. Attorneys used to practicing in one jurisdiction may be surprised to learn – after the fact – that Rule 49 is construed differently in another jurisdiction. Extensive briefing often is required to resolve these seemingly basic questions. Needless to say, the drafters of the federal rules did not intend to create this sort of disarray. See Fed. R. Civ. P. 1 (the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

Second, the confusion surrounding practice under Rule 49 diminishes the credibility of federal jury trials and leads to substantial injustice, by permitting the entry of judgment in a manner that ignores both the jury's findings on factual issues and the state law that the court is supposed to apply. This case is a good example. After a several-week trial in which plaintiffs sought to hold Volkswagen liable for manufacturing a defectively designed vehicle, the jury indicated in response to a straightforward factual interrogatory that the plaintiffs did not prove the existence of the claimed design defect. Volkswagen had a strong case to make under state law that the "no defect" finding entitled it to judgment in its favor, despite the fact that the jury also found Volkswagen to have been negligent. See, *e.g.*, *Greenland* v. *Ford Motor Co.*, 347 A.2d 159, 163 (N.H. 1975).[6] At the very least, Volkswagen had a powerful argument

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[6] See also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998), reporter's note to comment n (plaintiff's "failure to meet the

that it was entitled to a new trial because the jury's findings were irreconcilably inconsistent. Moreover, the case involved what appeared to be (and was called) a "special verdict" under Rule 49(a), as to which, in most parts of the country, inconsistencies may be raised after the jury is discharged. After inexplicably recharacterizing the verdict as one under Rule 49(b) rather than Rule 49(a), however, the First Circuit upheld a verdict of more than $10 million against Volkswagen, without addressing the merits of Volkswagen's argument that this outcome improperly ignored the jury's central factual determination. This resolution both "undermine[d] the validity and integrity of the judgment" and "usurp[ed] the jury's function" (*Mercer*, 671 F.2d at 948 n.1), raising concerns of constitutional magnitude.

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requisites of § 2(a) [manufacturing defect], (b) [design defect], or (c) [inadequate warnings] will defeat a cause of action under either negligence, strict liability, or the implied warranty of merchantability."). The law in many states is the same. See, *e.g.*, *Garrett* v. *Hamilton Standard Controls, Inc.*, 850 F.2d 253, 257 (5th Cir. 1998) ("a manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective"); *Sprankle* v. *Bower Ammonia & Chem. Co.*, 824 F.2d 409, 413 (5th Cir. 1987) (by rejecting strict liability claim, jury necessarily rejected essential element of negligence); *Chestnut* v. *Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971) (to establish negligence, plaintiff must prove that the product was dangerously defective when it left the plaintiff's hands); *Lecy* v. *Bayliner Marine Corp.*, 973 P.2d 1110 (Wash. App. 1999), rev. denied, 994 P.2d 845 (Wash. 2000) (where design defect was focus of plaintiff's case, verdict finding no defect in product design established "as a matter of law" that manufacturer was not negligent); *Montez* v. *Ford Motor Co.*, 161 Cal. Rptr. 578, 581 (4th Dist. 1980) ("jury determination of the non-existence of any defect was fatal to the theory of recovery based on negligence or on strict liability"); *Masi* v. *R.A. Jones Co.*, 394 A.2d 888, 891 (App. Div. 1978) ("the determination by a jury that defendant was not liable on the theory of strict liability eliminated the possibility that defendant could be guilty of negligence").

Finally, the outcome here would have been entirely different had the court of appeals adhered to the approach of most other courts. For cases to turn on regional variations in the construction of the federal rules severely undermines their purpose. *Cf.* Fed. R. Civ. P. 83(a)(1) (local district court rules "shall be consistent with * * * Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075").

The Court has on many occasions granted certiorari to address "threat[s] to the goal of uniformity of federal procedure." *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965). See also *Weisgram* v. *Marley*, 528 U.S. 440, 446 (2000) (certiorari granted because "[c]ourts of [a]ppeals have divided on the question" of the authority of appellate courts to direct entry of judgment as a matter of law); *Schlagerhauf* v. *Holder*, 379 U.S. 104, 109 (1964) ("[w]e granted certiorari to review undecided questions regarding the validity and construction of Rule 35"); *Hickman* v. *Taylor*, 329 U.S. 495, 497 (1947) ("[t]his case presents an important problem under the Federal Rules of Civil Procedure"). It should do so here.

II. THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER, UNDER RULE 51, A DEFENDANT MUST OBJECT TO THE SUBMISSION TO THE JURY OF MULTIPLE THEORIES IN ORDER TO PRESERVE ITS RIGHT TO CHALLENGE AN INCONSISTENCY IN THE VERDICT

The First Circuit also rested its waiver determination on the fact that Volkswagen did not object to the submission of both strict liability and negligence theories to the jury. Despite the fact that it was plaintiffs' prerogative under New Hampshire law to rely on both theories, the court of appeals held that Volkswagen was required to challenge this aspect of the jury instructions in order to preserve its right to object to any later inconsistency in the jury's findings. App., *infra*, 6a. The court also stated that Volkswagen "waived its right to object to any foreseeable combination of proper responses to the questions

posed on the verdict forms." *Id.* at 4a. In contrast, most other circuits sensibly evaluate the preservation of objections to inconsistencies by assessing the objecting party's conduct *after* the inconsistent verdict is announced, rather than requiring the defendant to make fruitless objections to practices that are plainly permissible under state law. This case thus provides the Court with the opportunity to address another significant and recurring conflict among the courts of appeals.

1. The decision below follows another recent decision of the First Circuit, in which the court held that the defendant was precluded under Rule 51 from arguing that a verdict was inconsistent because it had not "objected to the submission to the jury of both * * * strict liability and negligence claims." *Babcock* v. *General Motors Corp.*, 299 F.3d 60, 64 (1st Cir. 2002). Those rulings are consistent with several decisions of the Second Circuit. See *Jarvis*, 283 F.3d at 53-65; *Higgins* v. *Burleigh*, No. 96-7907, 1998 WL 433001, *1 (2d Cir. Apr. 22, 1998). The Eleventh Circuit, too, recently expressed apparent sympathy with this approach. *Mason*, 307 F.3d at 1276 n.7 (citing *Jarvis* and suggesting but not deciding that the defendant may need to alert the court to the possibility of potential inconsistency *before* the case is submitted to the jury).

The Third Circuit, however, has expressly rejected the contention that the failure to object under Rule 51 to jury instructions and interrogatories precludes a later argument that the verdict contains inconsistencies. See *Loughman*, 6 F.3d at 103 ("The question before us is not whether there was error in the instructions or the interrogatories, but the legal effect of the jury's answers, and, more specifically, whether the jury's answers can be reconciled."). In the Third Circuit's view, the issue of waiver is governed by the party's conduct *after* the inconsistent verdict is returned. *Ibid.* The Sixth Circuit has reached a similar conclusion in an unpublished decision. See *Holloway* v. *McIntyre*, Nos. 86-1001, 86-1898, 1988 WL 7961, at *5 (6th Cir. Feb. 4, 1988) (rejecting argument that defendant waived objection to verdict inconsistency by failing to object to

jury charge; "We do not believe a party should be held to an onerous inconsistency merely because he was not prescient of upcoming events.").

The Third Circuit's view is reflected implicitly in decisions by many other courts, which have addressed the merits of inconsistencies within verdict forms that frame alternative liability theories without suggesting that the submission of the case to the jury on those theories was erroneous or that the objecting party should have challenged it. See, *e.g.*, *Oja* v. *Howmedica, Inc.*, 111 F.3d 782, 791-792 (10th Cir. 1997) (entry of judgment for plaintiff on negligence was plain error in light of jury verdict for manufacturer on strict liability); *Bradley* v. *General Motors Corp.*, No. 96-8073, 1997 WL 354721, at *3 (10th Cir. June 26, 1997) ("when several causes of action are identical and defended on the same ground, a verdict for the plaintiff on one cause of action and for the defendant on another is inconsistent") (internal quotation marks and citation omitted); *Tipton* v. *Michelin Tire Co.*, 101 F.3d 1145, 1150-1151 (6th Cir. 1996) (granting judgment for defendant after concluding that jury findings that the defendant was negligent but not strictly liable were inconsistent); *Romero* v. *International Harvester Co.*, 979 F.2d 1444, 1454 (10th Cir. 1992) (granting judgment to defendant after concluding that the jury's findings for defendant on strict liability and negligent design theories precluded finding for plaintiff on negligent failure to retrofit theory); *Witt* v. *Norfe, Inc.*, 725 F.2d 1277, 1279-1280 (11th Cir. 1984) (granting new trial after concluding that the jury's findings for defendant on implied warranty and strict liability theories were inconsistent with its finding that the defendant was negligent); *Gumbs* v. *International Harvester, Inc.*, 718 F.2d 88, 94-95 (3d Cir. 1983) (ordering new trial because verdicts on strict liability and breach of implied warranty theories were inconsistent); *Werner* v. *Upjohn Co.*, 628 F.2d 848, 860 (4th Cir. 1980) (concluding that the jury's finding for the defendant on strict liability meant that its finding for the plaintiff on negligence was "obviously inconsistent and cannot stand").

2. The waiver rule imposed by the decision below also is in tension with generally accepted trial practice. It is widely recognized that submitting a case to the jury on multiple legal grounds may offer plaintiffs some tactical advantages. See John E. Theuman, *Products Liability: Inconsistency of Verdicts on Separate Theories of Negligence, Breach of Warranty, or Strict Liability*, 41 A.L.R. 4th 9 (1985) (negligence, strict liability, and implied warranty theories "are not mutually exclusive, and, since each has its advantages and disadvantages for the plaintiff, a products liability action will frequently allege all of them as alternative grounds for recovery") (footnote omitted). At the same time, it is understood that doing so creates the risk of inconsistent verdicts that may result in a new trial or the entry of judgment for the defendant. For example, a treatise on products liability observes:

> Although alleging alternative theories of liability gives the plaintiff a fall-back position should proof on an element of one theory prove insufficient, it also poses a potential hazard, in that a jury asked to make separate verdicts or findings on each theory may hold for the defendant on one theory while holding for the plaintiff on another; if these verdicts cannot be reconciled, the plaintiffs' victory may be thrown out by the trial or an appellate court.

AMERICAN LAW OF PRODUCTS LIABILITY 3D § 56.19 (2003). Despite these risks, submitting a case on multiple theories generally is viewed as the plaintiffs' prerogative.

That certainly was true in this case. The First Circuit has expressly recognized that, under New Hampshire law, plaintiffs *may* submit multiple theories to the jury. See *Babcock*, 299 F.3d at 65 (although the practice is "frowned upon," "New Hampshire law does not prohibit submitting both negligence and strict liability claims to the jury"); see also App., *infra*, 8a (citing *Babcock*); *Thibault* v. *Sears, Roebuck & Co.*, 395 A.2d 843, 849 (N.H. 1978). Indeed, the New Hampshire Supreme Court had reiterated *in this very case*, only a few months before trial, that plaintiffs were entitled to proceed on both theories.

Trull, 761 A.2d at 481. At the same time, the New Hampshire Supreme Court has observed that, in certain situations, "[h]aving found for the defendant on strict liability, a jury [may] not find for the plaintiffs on * * * negligence * * * except by disregarding their instructions." *Greenland*, 347 A.2d at 163. That Court also has pointedly stated:

> While we note that both counts are permitted, we do not recommend to plaintiffs that counts in both negligence and strict liability against the same defendant be submitted to the jury because of the confusion that is created.

Ibid.

Accordingly, *plaintiffs* assumed the risk that their decision to proceed on both counts would result in an untenable verdict. On the other hand, once the district court denied its motions during trial for judgment with respect to negligence on the basis that plaintiffs had not established any design defect (R. 1277-1283, 2358-2360), *Volkswagen* had no grounds to object to the submission of the case on both theories. Nor did Volkswagen have any reason to anticipate the inconsistency. As noted above, the jury was instructed that it could not rule against Volkswagen on *any* theory unless it found the presence of a design defect. Had the jury followed the instructions, it could not have answered "yes" to question 3 after answering "no" to question 1. In finding that defendants were negligent despite having concluded that plaintiffs did *not* prove the existence of a defect, the jury directly disobeyed that instruction.[7] "The

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[7] Moreover, the verdicts here contained more than an *implicit* inconsistency between the jury's findings on two legal theories – which has been deemed sufficient in many cases to preclude entry of judgment for the plaintiff. See, *e.g.*, *Tipton*, 101 F.3d at 1150 (granting judgment to defendant on plaintiff's negligence claim because "[i]n answering 'no' to the interrogatory on strict liability, the jury necessarily found that Tipton's tire was *not* in a 'defective condition'"); *Witt*, 725 F.2d 1277 (granting new trial because the

theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them." *City of L.A.* v. *Heller*, 475 U.S. 796, 798 (1986) (per curiam). Given that presumption, the court of appeals' holding that Volkswagen waived its objection to the jury's inconsistent findings by acceding to the instructions and the verdict form is entirely unjustified.

The fact that the verdict form (which was designed by the district court) invited the jury to respond to question 3 after answering "no" to question 1 should not alter this conclusion. True, it might have been preferable if the form had instructed the jury to end its deliberations if it answered question 1 in the negative. But the absence of that instruction did not "invite" the inconsistency: had the jury obeyed the court's *other* instructions, a "no" answer to question 1 would necessarily have been followed by a "no" answer to question 3. See App., *infra*, 41a. Volkswagen's failure to predict that the jury would disregard the instructions should not be deemed a waiver of its right to challenge a judgment that ignores the jury's findings.

Indeed, plaintiffs, more so than Volkswagen, should have been alert to the possibility that the verdict forms created the possibility of inconsistency. As mentioned above, the New Hampshire Supreme Court has warned *plaintiffs* of just this outcome. *Thibault*, 385 A.2d at 843. Because the inconsistency was made possible by plaintiffs' trial strategy – and either side might have brought the issue to the district court's attention – it is unfair to allow plaintiffs "to prevail merely by remaining silent" (*Los Angeles Nut House*, 825 F.2d at 1354), in derogation of state law disallowing such a judgment. See also *Bradley*, 1997 WL 354721, at *4 ("if the plaintiffs had elected

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jury's implicit finding that product was not defective undermined finding that defendant was negligent). The jury made an *express* factual finding that the plaintiff had not proved "by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions[.]" App., *infra*, 34a.

to proceed only on their theory of negligence, no inconsistency would exist with the findings of comparative fault").

Finally, it must be noted that the right to have judgment entered in accordance with the jury's findings implicates the Seventh Amendment's right to trial by jury. See *Atlantic & Gulf Stevedores, Inc.*, 369 U.S. at 359. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 756 (1970). The failure to object to parenthetical directions on a verdict form drafted by the court surely does not satisfy this standard.

3. In ruling that defendants may not challenge verdict inconsistencies unless they first predict and try to prevent them, the First Circuit has strayed far from the usual course. In the vast majority of cases, courts have determined whether a party has preserved its objections to inconsistencies by evaluating its conduct *after* the inconsistent verdicts are returned. The Third Circuit has stated expressly that this is the correct approach. So far as we are aware, only the First and Second Circuits have adopted the anomalous rule reflected in the decision below, under which the right to challenge a verdict inconsistency frequently is waived before the jury deliberations even begin.

The divergence among the courts of appeals regarding this frequently recurring issue will engender enormous confusion and inefficiency in the federal courts. To ensure that their rights are preserved, defendants will have to raise and press objections to a plaintiff's submission of alternative liability theories, even when state law unequivocally provides that the plaintiff may proceed in this fashion. In such circumstances, the required objections either will be pointless or will lead the district court into error. Federal procedural rules should not be construed to require such counterproductive undertakings.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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MAY 2003

APPENDIX

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 01-2010

NATHANIEL TRULL, PPA DAVID TRULL AND DAVID TRULL, ADMINISTRATOR OF THE ESTATE OF BENJAMIN TRULL, Plaintiffs, Appellees,

v.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN, AG, Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Joseph A. DiClerico, Jr., *U.S. District Judge*]

Before

Lipez, *Circuit Judge*, Campbell and Bownes, *Senior Circuit Judges*.

Howard B. Meyers with whom *Carolyn Cole Durst*, *Myers Associates, PLLC*, *Michael Hoenig*, *Roger Arentzen*, *Miriam Skolnik*, and *Herzfeld & Rubin, P.C.* were on brief for appellants.

Alan L. Cantor with whom *Edward M. Swartz*, *David P. Angueira*, and *Swartz & Swartz* were on brief for appellees.

November 14, 2002

BOWNES, *Senior Circuit Judge*. This appeal arises out of an action brought in the district court arising from a collision on February 19, 1991, in Conway, New Hampshire, between a 1986 Volkswagen Vanagon and a 1979 AMC Concorde. The Vanagon was driven by David Trull. His two sons Benjamin and Nathaniel were seated in the rear passenger seat. Benjamin was killed; his brother, Nathaniel, received serious injuries. The father, David Trull, brought this action on behalf of Benjamin's estate and Nathaniel, who was a minor at the time the complaint was brought.

The plaintiffs asserted claims in strict liability and negligence against both defendants-appellants Volkswagen of America, Inc. and Volkswagen, AG (collectively "VW"). The evidence was essentially the same as to both theories of liability. The district court instructed the jury: "The plaintiffs have asserted strict product liability and negligence claims against the defendant. However, they need not prove both claims to recover. They will be entitled to recover if they prove one or the other of these claims."

Plaintiffs' claim of liability was that the 1986 Vanagon had been defectively designed and was unreasonably dangerous because it was not equipped with lap/shoulder belts in each of the rear seats. The only passenger body restraints were lap belts. The jury, in answer to specific questions, found that VW was not liable in strict liability but was liable in negligence it awarded Nathaniel Trull the sum of $8,917,335.27. It awarded the estate of Benjamin Trull $1,290,980.70.

This is the second time that this case has been before us. In the first trial VW prevailed. The plaintiffs appealed on the ground that the trial judge erred in putting the burden of proof as to enhancement of injuries on them. We certified that issue to the New Hampshire Supreme Court. *Trull* v. *Volkswagen of*

Am., 187 F.3d 88 (1st Cir. 1999). The Supreme Court of New Hampshire ruled that in a damages enhancement situation the burden of proof falls on the defendant. *Trull* v. *Volkswagen of Am., Inc.*, 761 A.2d 477 (N.H. 2000). We remanded to the district court for a new trial. *Trull* v. *Volkswagen of Am., Inc.*, 229 F.3d 343 (1st Cir. 2000). We affirm the judgment below.

I. THE VERDICTS

There are four issues posited for review. Our discussion of the issues does not follow the order in which they are argued in VW's brief. We start with VW's contention that the verdicts were inconsistent, that the negligence finding of liability was nullified by the jury finding that VW was not liable on the claim of strict liability and therefore there should be either a judgment for VW or a new trial.

The case was tried from the start by plaintiffs on the theory that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts on the rear seats and this omission caused the death of Benjamin Trull and seriously injured Nathaniel Trull. In its jury instructions the district court explained separately the elements of strict liability and negligence. No objection was made by VW to the verdict forms handed to the jury or the risk of inconsistent verdicts until after the clerk had been instructed by the court "to enter judgment in accordance with the special findings of the jury" and the jury discharged.

VW implies in its brief at page 15 that it did not have the time to make any objections or that the district court speeded up the post-verdict process to thwart any objections. There is nothing in the record to substantiate this implication. Labeling the post-verdict session a "truncated ten-minute session" does not change the facts. VW's attorneys may have been shocked

by the verdict but there is nothing in the record to indicate that VW wished to object to anything.

The record shows that VW did not object to the verdict forms at any time prior to their submission to the jury. The record further establishes that there were no objections to the jury instructions at any time either prior to or after their delivery. This means that VW has waived its right to object to any foreseeable combination of proper responses to the questions posed on the verdict forms. It also means that VW was satisfied with the jury instructions until the jury returned the verdicts.

If we assume arguendo the verdicts were inconsistent, and as to this we have serious doubts, there can be no doubt that VW's failure to follow the applicable Rule of Civil Procedure bars its appeal. It is clear to us that Federal Rule of Civil Procedure 49(b) applies to the verdict forms, not Rule 49(a) as VW asserts. Rule 49(a) states: "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." Here, for example, a special verdict form could have included questions such as whether the brothers were wearing lap belts at the time of the collision. When such a form is used, the jury makes only findings of fact; it is up to the court to apply the law. *Babcock* v. *Gen. Motors Corp.*, 299 F.3d 60, 63 (1st Cir. 2002); *see* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2503 (2d ed. 1994). There can be little doubt that this was not the type of verdict form used in this case.

The verdict form in this case fell within the ambit of Rule 49(b) which addresses general verdicts and states: "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict."

Although there were no written interrogatories submitted to the jury, it is clear that the two liability questions submitted to the jury were general verdict forms under Rule 49(b).

Strict Liability

1. Do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating positions?

No
(Yes or No)

Negligence

3. Do you find by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions?

Yes
(Yes or No)

The last sentence of Rule 49(b) specifically discusses inconsistent answers to questions submitted to the jury: "When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

We have held that under Rule 49(b), objections to the inconsistency of verdicts must be made after the verdict is read and before the jury is discharged. *E.g., Babcock*, 299 F.3d at 63; *Merchant* v. *Ruhle*, 740 F.2d 86, 89 (1st Cir. 1984); *Skillin* v. *Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981). We rule that VW forfeited its objection to the alleged inconsistency by failing to object at any time prior to the jury's discharge.

The instructions made it clear that the jury was to be asked to decide the issue of liability on both the theory of strict liability and the theory of negligence. The verdict forms had been examined by counsel for VW before they were submitted. VW's reason for its failure to object at the critical times was that the verdicts did not become inconsistent until after the jury had completed them. But we cannot accept this; to do so would countenance "agreeable acquiescence to perceivable error as a weapon of appellate advocacy." *McIsaac* v. *Didriksen Fishing Corp.*, 809 F.2d 129, 134 (1st Cir. 1987) (quoting *Merchant*, 740 F.2d at 88-89); *see also Babcock*, 299 F.3d at 64. By failing to timely object to the jury instructions, VW thereby waived any objection it may have had. *See* Fed. R. Civ. P. 51. Moreover, that failure to object greatly limits the scope of subsequent review. *See* Fed. R. Civ. P. 61.

Rule 51 of the Federal Rules of Civil Procedure provides in pertinent part: "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Rule 51 has been stringently enforced to the extent that a district court judge cannot waive it even with the acquiescence of counsel. *Poulin* v. *Greer*, 18 F.3d 979, 982 (1st Cir. 1994); *Smith* v. *Mass. Inst. of Tech.*, 877 F.2d 1106, 1109 (1st Cir. 1989); *McGrath* v. *Spirito*, 733 F.2d 967, 969 (1st Cir. 1984) ("[Rule 51] is binding on both the court and attorneys and neither can circumvent it."). And, of critical importance here, a failure to object as required by Rule 51 deprives the non-objecting party of review under Rule 61, either before the trial court on a post-trial motion or on appeal. *Babcock*, 299 F.3d at 64; *Scarfo* v. *Cabletron Sys., Inc.*, 54 F.3d 931, 941 (1st Cir. 1995).

We quote extensively from our prior opinion in *Babcock*, 299 F.3d at 64-65:

> The only exception to nullification of appellate issues for failure to follow Rule 51 is the plain error doctrine. *Smith* v. *Kmart Corp.*, 177 F.3d 19, 28-29 (1st Cir. 1999). Reversal under that doctrine requires that (1) there be error; (2) the error was "plain" (i.e. obvious and clear under current law); (3) the error affected substantial rights; and (4) the error threatened a miscarriage of justice. *Danco, Inc.* v. *Wal-Mart Stores, Inc.*, 178 F.3d 8, 15 (1st Cir. 1999). We have applied the plain error doctrine "stringently" in civil cases. *Id.* Accordingly, we will grant relief on an issue that has been forfeited on appeal only "to prevent a clear miscarriage of justice . . . or where the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Romano* v. *U-Haul Int'l*, 233 F.3d 655, 664 (1st Cir. 2000) (citations and internal quotation marks omitted). We might find plain error where "'the failure to raise the claim below deprived the reviewing court of helpful factfinding; . . the issue is one of constitutional magnitude; . . . the omitted argument is highly persuasive; . . . the opponent would suffer special prejudice; . . . and, perhaps most importantly, . . . the issue is of great importance to the public.'" *Id.* (quoting *Play Time, Inc.* v. *LDDS Metromedia Communications, Inc.*, 123 F.3d 23, 30 n.8 (1st Cir. 1997) (alterations in original).
>
> We examine New Hampshire law to determine whether there was plain error below. If New Hampshire law forbade combining a count in negligence with a count in strict liability in a tort case, the plain error doctrine might be applicable. But New Hampshire law does not prohibit submitting both negligence and strict liability claims to the jury. *See, e.g., Cyr* v. *J.I Case Co.*, 652 A.2d 685, 693 (N.H.

> 1995); *Thibault* v. *Sears, Roebuck & Co.*, 395 A.2d 843, 849 (N.H.1978); *Greenland* v. *Ford Motor Co., Inc.*, 347 A.2d 159, 163 (N.H. 1975). The most that can be said is that submission of both claims is frowned upon. *Thibault,* 395 A.2d at 849 ("While . . . both counts are permitted, we do not recommend to plaintiffs that counts in both negligence and strict liability be submitted to the jury because of the confusion which is created"); *see also Greenland*, 347 A.2d at 163. We will not create a general rule of prohibition in light of the New Hampshire Supreme Court's reluctance to do so. We rule that it was not plain error to submit counts in both negligence and strict liability to the jury.

For the reasons set forth in *Babcock* we find there was no plain error here.

The only question on the issue of claimed inconsistent verdicts that does not admit of an easy solution is whether the verdicts were inconsistent. The district court held that they were not, stating:

> Taking into account the New Hampshire law applicable to each claim and the evidence that was adduced at trial, the court finds that the jury's answers to special verdict questions one and three propounded in each of the plaintiffs' cases were not inconsistent. The jury evaluated the evidence in light of each claim and answered the special verdict questions as instructed. The defendant's inconsistency claim must fail on its merits.

Our review of the district court's ruling is *de novo* because this is a pure question of law. *See Gamma Audio & Video, Inc.* v. *Ean-Chea*, 11 F.3d 1106, 1114 (1st Cir. 1993).

We note first that there is a distinct difference in the wording of the two questions. The question on strict liability stated:

Strict Liability

1. Do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating positions?

The question was limited only to defective design. The question on negligence, however, had more flesh to it:

Negligence

3. Do you find by a preponderance of the evidence that the defendant was *negligent in designing and/or testing the 1986 Vanagon* because it lacked lap/shoulder belts in the rear seating positions? (Emphasis added.)

Under the wording of the negligence question the jury could have found Volkswagen liable on one or more of the following grounds: because its design of the rear seat restraint mechanism did not include lap/shoulder belts; there was negligent testing by VW that did not disclose that lap/shoulder belts were needed to restrain the torso of a passenger in the rear seat from being thrown violently forward in an accident; or that VW's negligence encompassed both design and testing.

VW has cited cases from other jurisdictions that have ruled as a matter of law that verdicts based on a finding of no strict liability in a defective design case would nullify a liability finding of negligent design. As we stated in *Babcock*, however,

> We need not determine whether that proposition is correct — it is enough to conclude, as we do, that New Hampshire law is not so clear on the question that it was plain error for the district court to enter judgment on the jury's verdict.

299 F. 3d at 65. It is clear that under New Hampshire tort law, both strict liability and negligence questions can be submitted to the jury. *See Thibault*, 395 A.2d at 849; *Greenland*, 347

A.2d at 163. Moreover, as noted above, the negligence question submitted to the jury referenced "negligent design *and/or testing*" as possible grounds for a finding of liability.

Therefore, in the context of this case, we hold that it was not plain error for the district court to enter judgment upon verdicts indicating liability for negligence but not for strict liability. The jury was instructed properly on the legal elements of strict liability and negligence. The jury was also instructed that both liability questions were to be answered. It is obvious that the jury understood the instructions and its duty. It found no liability on strict liability and did not answer the damages part of the question. No questions evincing confusion or ignorance were asked of the court by the jury. It is apparent that the jury understood that the focus of strict liability is on whether the design itself is unreasonably dangerous whereas in a negligence case the focus is on the conduct of the manufacturer, which brings us to the next issue, the evidence of VW's negligence.

II. EVIDENCE OF NEGLIGENCE

VW claims that plaintiff failed "to adduce sufficient evidence to establish negligence." VW Br. at 17. It first argues that the standard of review is de novo. This position is contrary to the applicable law. VW filed a post-trial motion for a remittitur or, in the alternative, for a new trial. It also filed a motion for judgment as a matter of law or a new trial. It is these motions that determine the standard of review.

In reviewing the denial of a motion for judgment as a matter of law we must evaluate the evidence and inferences adduced therefrom in the light most favorable to the plaintiff. *Raymond* v. *Raymond Corp.*, 938 F. 2d 1518, 1521 (1st Cir. 1991); *Austin* v. *Lincoln Equip. Assocs., Inc.*, 888 F.2d 934, 937 (1st Cir. 1989). Such a motion should be granted by the district court only if, as a matter of law, the evidence would lead a reasonable

jury to only one conclusion that the defendant was entitled to judgment. *Hendricks & Assocs., Inc.* v. *Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991). And the reviewing court may only reverse a trial judge's ruling denying a motion for a new trial if the district court's decision is so clearly mistaken as to constitute a miscarriage of justice. *Raymond*, 938 F.2d at 1522; *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 558 (1st Cir. 1989).

With this standard of review as our guide we start our analysis. Both parties agree that the applicable standard of care is that of a reasonably prudent automobile manufacturer. We first note that the front seats of the Vanagon were equipped with lap and shoulder belts. This means that this type of body restraint was known and available to VW. There was evidence by one of plaintiff's experts as follows: "There was sufficient evidence before 1986 [the year of the Vanagon's manufacture] to show that lap belts alone just can't do the job — to protect a person, you need a lap and shoulder belt."

The results and evaluation of tests performed by VW relative to the safety afforded rear seat passengers equipped with lap belts only, and those with both lap and shoulder belts, were exhibits in the case. The tests were performed by VW on April 27, 1981, which was five years prior to the manufacture of the Vanagon in which Benjamin and Nathaniel Trull were passengers. The pertinent conclusions that VW made were as follows:

Limited protection by lap belt

> The occupant restrained with lap belt was displaced forward due to elongation of the belt. The rotational movement of the upper torso about the hip point enables head contact with the back rest in front of it.

1. *Evaluation regarding injury risk*

Three-point belt

The occupant restrained with three-point belt is well protected in a frontal crash. No contact with the steering wheel, instrument panel, transverse beam, etc. (photo 5 and 6).

Lap belt

Lap-belt restrained vehicle occupants are subject to a high degree of head and cervical vertebrae injuries. The lap belt enables a rotational motion about the hip point. (Photo 7, 8 and 9).

There was testimony by one of plaintiff's expert witnesses (D'Aulerio) that the use of a shoulder belt would have eliminated the head injuries to Nathaniel and Benjamin. The witness explained to the jury that the lap belt alone acted as a lever so that as the torso and head were bent they were accelerated forward and inclined downward at the moment of impact. The lap belt, therefore, according to the expert, was partially responsible for the head injuries received by both brothers.

Another of plaintiffs' experts, Dr. Anthony Sances, had a master's degree in physics and a Ph.D. in biomedical engineering. Dr. Sances had considerable experience in determining the cause and extent of injuries resulting from automobile collisions; he had been involved in over a thousand cases. It was his opinion that there would have been no head injuries to either Benjamin or Nathaniel if they had been wearing shoulder belts.

We summarize other record evidence of negligence:

It was known since the 1950's in the automotive industry that shoulder belts restrain forward movement of occupants while lap belts do not;

It was known for a long time before 1986 that lap belts alone did not offer adequate protection to occupants and that lap-shoulder belts were needed to do the job;

In 1980, NHTSA sent a letter to all motor vehicle manufacturers, including Volkswagen in which it stated, "rear seat three-point belts should be offered for additional protection to rear seat occupants. They have been offered by Volvo, Mercedes and a few others for many years as standard equipment";

In 1986, Volkswagen sold the Vanagon in four foreign countries with rear shoulder harnesses as standard equipment;

In 1986, Volkswagen sold four out of five of its sedan type vehicles in the United States with rear lap shoulder belts as standard equipment;

Since the early 1970's, all Vanagons had anchor points which would have allowed for installation of lap-shoulder belts in the rear seats;

Volkswagen offered the same rear seat shoulder harness as optional equipment for the 1986 Vanagon sold in the United States which was standard equipment in other countries.

Based on our examination of the record, we have no difficulty ruling that there was a plethora of evidence from which the jury could find that VW was negligent in not equipping the Vanagon sold to plaintiff with shoulder belts on the rear passenger seats and this negligence was the proximate

cause of the enhanced injuries suffered by Nathaniel and Benjamin in the collision.

III. THE DAMAGES AWARDED NATHANIEL TRULL

VW contends that the award of $8,917,335.27 "is wildly excessive, justifying substantial reduction." VW Br. at 48. Our standard of review of damages is abuse of discretion:

> We review the denial of a motion for a remittitur for abuse of discretion. *See Anthony*, 17 F.3d. at 493; *McDonald* v. *Federal Laboratories, Inc.*, 724 F.2d 243, 246 (1st Cir. 1984). We will find an abuse of discretion only if the jury's verdict exceeds "any rational appraisal or estimate of the damages that could be based on the evidence before the jury." *Milone* v. *Moceri Family, Inc.*, 847 F.2d 35, 36 (1st Cir. 1988) (quoting *Segal* v. *Gilbert Color Systems, Inc.*, 746 F.2d 78, 81 (1st Cir. 1984)). We have noted that "the obstacles which stand in the path of" such claims of excessiveness "are formidable ones." *Wagenmann* v. *Adams*, 829 F.2d 196, 215 (1st Cir. 1987). Translating legal damage into money damages is a matter "peculiarly within a jury's ken," especially in cases involving intangible, non-economic losses. *Id.*; *see also Correa* v. *Hospital San Francisco*, 69 F.3d 1184, 1197 (1st Cir. 1995) ("An appellate court's normal disinclination to second-guess a jury's evaluation of the proper amount of damages is magnified where, as here, the damages entail a monetary valuation of intangible losses, and the trial judge, having seen and heard the witnesses at first hand, accepts the jury's appraisal."), *cert. denied* 517 U.S. 1136 (1996). Viewing the evidence in the light most favorable to the verdict, the jury's assessment of damages will not be disturbed unless it is "grossly excessive, inordinate, shocking to the conscience of the court, or so

> high that it would be a denial of justice to permit it to stand." *Id.* (quoting *Segal*, 746 F.2d at 80-81) (internal quotation marks omitted).

Smith v. *Kmart Corp.*, 177 F.3d 19, 29-30 (1st Cir. 1999).

VW points to a number of mental, physical, and psychological problems with which Nathaniel was afflicted prior to the accident. One of the bedrock foundations of tort law is that the defendant takes the plaintiff as it finds him. *See Fiquerora-Torres* v. *Toledo-Davilla*, 232 F.3d 270, 275 (1st Cir. 2000); *Dotty* v. *Sewall*, 908 F.2d 1053, 1059 (1st Cir. 1990); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43 (5th ed. 1984). VW points out that there was conflicting evidence on how seriously Nathaniel was injured. From our vantage point we focus on the evidence favorable to the verdict. *See Smith*, 177 F.3d at 30.

VW claims that based on unrefuted medical evidence Nathaniel did not suffer a brain injury in the accident. To put it in VW's words: "In the crash he sustained a head injury consisting of a skull fracture and *epidural hematoma without brain damage and sequelae*." VW Br. at 49 (emphasis in original). But on cross-examination, VW's expert medical witness, Dr. Mendelsohn, testified that Nathaniel Trull did, in fact sustain a change in his condition, making him worse.

There was competent evidence that Nathaniel sustained a depressed skull fracture causing blood to form inside the brain that had to be drained away by an operation called a craniotomy.

There was evidence by a neuropsychologist and a clinical psychologist both of whom had treated Nathaniel before and after the accident. The opinion of these experts was that Nathaniel's head trauma exacerbated his pre-existing condition

so that he is now unable to live independently and will have to live under supervised structured conditions for the rest of his life.

There was evidence by a medical economist that the life expectancy of Nathaniel was 58.1 years and that the economic loss due to the injury was approximately $5.3 million. As the district court pointed out in its order denying VW's motion for a remittitur, VW did not submit any economic evidence. The figure of $5.3 million did not include any amount for pain and suffering or other hedonic damages.

The jury was properly instructed that Nathaniel was entitled to recover for past and future, pain and suffering, mental anguish and disability.

We rule that the district court did not abuse its discretion in denying the motion for a remittitur.

IV. THE EXCLUSION OF TEST REPORTS IN THE GERMAN LANGUAGE

This issue need not detain us long. VW offered as exhibits test reports in the German language. Plaintiff objected and the court informed VW that the reports would not be admitted unless they were translated into English. This was not done. The district court did not abuse its discretion in excluding the documents.

The judgment below is affirmed. Costs on appeal awarded to plaintiff.

~ Concurring Opinion Follows ~

CAMPBELL, *Senior Circuit Judge*, concurring. I concur in the judgment. I write separately because I do not understand why my colleagues, after finding that VW did not preserve the issue of verdict inconsistency, have gone on to discuss that

issue to the extent they do, even suggesting a likely consistency between the jury's two verdicts. Whether or not the jury's responses on defective design and negligence were inconsistent, VW's failure to preserve the inconsistency issue, and the absence of plain error, makes the inconsistency issue irrelevant. New Hampshire law is so clouded as to make it undesirable for a federal appeals court to speculate unnecessarily in ways that might later be seen as pronouncements on one or another facet of the inconsistency issue.

I fully agree with my colleagues that by failing to object at the proper time to the court's relevant instructions and jury forms, and by failing to object on inconsistency grounds after the verdict was read and before the jury was dismissed, VW waived any claim of verdict inconsistency. *See, e.g., Howard* v. *Antilla*, 294 F.3d. 255, 251 (1st Cir. 2002); *Bonilla* v. *Yamaha Motors Corp.*, 955 F.2d 150, 155-56 (1st Cir. 1992). And I further agree there was no plain error. The latter is not simply a question of whether the court acted correctly under New Hampshire law. Even a clear and obvious error of state law would not, by itself, amount to plain error. The error would not be "plain", so as to excuse VW's failure to object, unless the error had also resulted in a miscarriage of justice. *See, e.g., United States* v. *Olano*, 507 U.S. 725, 733 (1993); *Chestnut* v. *Lowell*, 30S F.3d 18, 20 (1st Cir. 2002). Here I can see no miscarriage of justice regardless of whether or not the jury findings on defective design and negligence were inconsistent. It is therefore entirely unnecessary for this court to suggest there was in fact consistency, in particular because the negligence question submitted to the jury referenced negligent testing as well as negligent design. Reconciling the finding of no defective design with a finding of negligent testing, on this record, is not much easier than reconciling it with a finding of negligent design. To be sure, New Hampshire apparently

permits cases to be submitted simultaneously on defective design and negligence theories, but this does not determine what should be done if the jury's results seem contradictory in a particular case.

The overriding point here is simply that VW did not preserve the inconsistency issue. That should end the matter. While the jury's logic with respect to its answers on the two counts is indeed debatable, there is no obvious injustice to entering judgment on the verdicts, as the court did. The jury's intentions were entirely clear — it found liability predicated on negligence, and there was ample evidence to support such a finding. Whatever the inconsistency of its negative finding on defective design, that finding (if inconsistent) is most reasonably seen as the product of confusion as to the elements of the defective design count rather than as casting doubt on the validity of the jury's resolution of the negligence count. There is nothing fundamentally unjust about entering judgment on both counts. If VW wanted to argue the inconsistency issue, it needed to preserve its rights.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

David Trull as Administrator
of the Estate of Benjamin Trull
and as Father and Next Friend
of Nathaniel Trull

v. Civil No. 94-015-JD

Volkswagen of America, Inc.
Volkswagen, A.G.

ORDER

The defendants have filed a motion for an order of remittitur or, in the alternative, an order for a new trial (document no. 225) and a motion for judgment as a matter of law or, in the alternative, a new trial (document no. 226) to which the plaintiffs have filed objections (documents no. 228, 229).

The court will consider the two motions together.

The defendants (referred to collectively as the defendant) claim that the verdicts were inconsistent because the jury, in response to the special verdict questions propounded to it, found on the one hand that under the strict liability claim the vehicle in question was not defectively designed (Question 1 on strict liability) and on the other hand found that under the negligence claim the defendant was negligent in designing and/or testing the vehicle (Question 3 on negligence). This claim is without merit for several reasons.

The New Hampshire Supreme Court in *Trull v. Volkswagen of America, Inc.*, 761 A.2d 477 (2000), in response to a certification request from the United States Court of Appeals

for the First Circuit (*see Trull v. Volkswagen of America, Inc.*, 187 F.3d 88 (1st Cir. 1999)), set forth the New Hampshire law on liability for defective design in a crashworthiness case. The court stated, among other things, that "A strict liability action based upon a theory of defective design may be joined with an action grounded in negligence." *Trull*, 761 A.2d at 481 (citing *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 807, 395 A.2d 843, 846 (1978)). This principle of New Hampshire law, which has been recognized since 1978, was relied upon by the plaintiffs in this case who claimed liability for a design defect based on two legal theories, strict liability and negligence. The court instructed the jury in accordance with New Hampshire law on the legal principles that applied to each claim and made it clear that the plaintiffs need not prove both claims in order to recover but could recover if they met their burden of proof with respect to either claim.

Taking into account the New Hampshire law applicable to each claim and the evidence that was adduced at trial, the court finds that the jury's answers to special verdict questions one and three propounded in each of the plaintiffs' cases were not inconsistent. The jury evaluated the evidence in light of each claim and answered the special verdict questions as instructed.

The defendant's inconsistency claim must fail on its merits. However, assuming there were merit to the claim, there is, in the opinion of the court, a procedural hurdle that the defendant has failed to overcome in order to raise such a claim at this time.

The court presented counsel with a draft of proposed jury instructions and special verdict forms. The instructions were quite similar to those given in the first trial with the principle changes being those required as a result of the New Hampshire Supreme Court's decision in *Trull*, *supra*, relating to the

allocation of the burden of proof in a crashworthiness case. Counsel had an opportunity to review the draft instructions and special verdict forms with the court during a charging conference and then again when the final draft was prepared. After the charge was delivered to the jury, the court invited counsel to the bench to present any objections they might have to the charge. Defense counsel, while raising several objections, did not object to the appropriateness of instructing the jury on the two theories of liability or to the manner in which those instructions presented the theories, and did not raise any issue concerning the possibility of inconsistency either with respect to the instructions or the special verdict forms. When the jury returned its answers to the questions on the special verdict forms, defendant's counsel did not raise any issue concerning inconsistency, something which could have been readily accomplished with a simple request to approach the bench. The jury was then discharged.

This case has been through two trials. If the issue of inconsistent verdicts is as significant as the defendant contends, then it is one the defendant should have anticipated and should have raised with the court earlier in the proceedings when there were numerous opportunities to do so. However, it was not raised during the charging conferences for either trial, by way of objection immediately after the jury charge was given in either trial, or by way of objection immediately following the jury's verdicts in the second trial. It was in the second trial that the issue was raised for the first time in a motion filed a number of days after the verdicts were returned and the jury had been discharged.

The defendant was under an obligation to raise the issue of inconsistency with respect to the special verdict forms after the jury was charged and before deliberations began. As previously noted, since this issue is one of major concern to the defendant,

it should have been anticipated by the defendant and raised in a timely manner. As the record reflects, the defendant failed to do so. Fed. R. Civ. P. 51 states:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

This rule is applicable to special questions as well as jury instructions. *Anderson v. Cryovac*, 862 F.2d 910, 918 (1st Cir. 1988). As the court noted in *Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931, 940 (1st Cir. 1995), "[t]he rule has been vigorously enforced in this circuit." The court in *Scarfo* provided an excellent explanation of the rationale for rigorous enforcement of the principles embodied in the rule.

> A rigorously enforced timeliness principle is fundamental both to fair process and to avoiding adverse effect on substantial rights of the parties. Under such a principle, a clearly defined opportunity to present a contention must be exercised at a precisely defined time in the trial proceedings. It is a now-or-never opportunity that a party must, at that precise time, use or lose. *Cf. Arenson v. Southern Univ. Law Ctr.*, 43 F.3d 194, 198 (5th Cir. 1995) (invoking the phrase "use it or lose it" in relation to timeliness of motions for judgment as a matter of law and, alternatively, for a conditional new trial).
>
> One of these contexts is the preparation of the charge to the jury, including the specific phrasing of any questions submitted to the jury. The moment immediately before the jury retires to deliberate is a time when hard choices, with significant consequences, must be made by the parties and by the trial judge. Interests of fairness to each party weigh heavily in favor of requiring that every other party, at this

> critical moment, use or lose any right to assert that the trial court should change in some way the court's instructions to the jury on the substantive law governing the case. It is awkward to change instructions after the jury has commenced deliberating, and as a practical matter, once the jury has been disbanded after returning a verdict, it can never be called back to receive the corrected charge that the trial court might have given if asked at the right time to do so.
>
> Failure to exercise the right to object to the court's charge at the critical moment prescribed by Rule 51 results in the loss of an opportunity to review under a standard no more burdensome for the appellant than the harmless error standard. Unless the reviewing court concludes that the charge has caused a miscarriage of justice or has undermined the integrity of the judicial process, the charge is treated as having an effect closely analogous to law-of-the-case doctrine, and for similar reasons of policy and fairness of process.

Id. at 940.

The defendant was also under an obligation to raise the issue of inconsistent verdicts with the court immediately following the return of the verdicts and before the jury was discharged so that the court, if necessary, could have taken appropriate steps to cure the alleged problem. Just as counsel, following the announcement of a verdict, may immediately request that the jury be polled, so could counsel in this case have immediately requested the opportunity to approach the bench where the inconsistency issue could have been raised with the court. The court would then have been in a position to take a recess to allow counsel for the parties to address the issue, and, if necessary and appropriate, to undertake measures through

additional instructions and special questions to have the jury clarify any inconsistency. As the record reflects, no such request was made. The court, perceiving no inconsistency, was not under an obligation to raise the issue on the defendant's behalf. In *Phav v. Trueblood Inc.*, 915 F. 2d 764, 769 (1st Cir. 1990), the court stated:

> As we have repeatedly said, the use of special interrogatories puts the parties on notice that there might be an inconsistent verdict. *See Austin v. Lincoln Equip. Assoc., Inc.*, 888 F.2d 934, 939 (1st Cir. 1990). "If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking." *Anderson*, 862 F.2d at 918.
>
> There is an exception to this rule for "plain error" but it applies only where the error results in a "clear miscarriage of justice" or seriously affects "the fairness, integrity or public reputation of judicial proceedings." [*Smith v. Massachusetts Inst. of Tech.*, 877 F.2d 1106, 1110 (1st Cir. 1989).]

The defendant failed to act expeditiously on this matter.

The defendant also claims juror confusion as a result of several other instructions that were given. As far as these claims are concerned, the defendant appears to be trying to manufacture confusion ex post facto where in fact none existed. Furthermore, the defendant also failed to object to these instructions in a timely manner.

The court concludes that defendant's claims concerning inconsistent verdicts, the special verdict forms, and certain other jury instructions are not only without merit but also they have not been raised in a timely fashion. The court need not

address the application of the plain error standard. The court denies the defendant's request for a new trial on these claims.

The defendant also claims the court erred in failing to allow its witness, Aribert Kolms, to introduce and discuss certain test reports that were in the German language. The defendant claims that these reports were important to its defense. Under Fed. R. Evid. 401, relevant evidence is admissible unless there is a basis to exclude it. Assuming the relevance of the proffered reports and their importance to the defendant's case, it was incumbent upon the defendant to provide English translations of any reports it intended to introduce into evidence at trial either as an exhibit or through the testimony of a witness. Absent an English translation, plaintiffs' counsel would not be able, in a meaningful way, to object to the contents of the reports or to cross examine the witness about the reports. The court, likewise, would not be able to carry out its duties if it could not read the reports. And finally, exhibits in German would not be understood by the jury and this would prevent the jury from properly performing its duties. The court exercised its sound discretion in this matter based on fairness, practicality and common sense. After the court had ruled on this matter, the defendant could have requested the opportunity to have the reports translated and to recall the witness. The court in all likelihood would have granted such a request. However, as the record will reflect, the defendant made no attempt to overcome the obstacle to the admissibility of this evidence, assuming it was otherwise admissible. This claim is without merit.

The defendant next claims that the testimony of Elizabeth Trull should not have been admitted. The court considered a similar request before trial and denied it. The court, in the exercise of its discretion, found that the testimony was relevant and material. This claim is without merit and does not justify a new trial.

The defendant claims that there was insufficient evidence to support a finding of design defect under the plaintiffs' negligence claim and asks the court to enter judgment as a matter of law. This issue was contested and there was a significant amount of conflicting evidence presented to the jury. The credibility of a number of witnesses was also a matter that had to be considered and resolved by the jury. In *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1521 (1st Cir. 1991), the court stated:

> On a motion for judgment notwithstanding the verdict, the trial judge must view all the evidence and inferences flowing therefrom in the light most favorable to the non-moving party. *Hendricks & Assoc., Inc. v. Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991); *Austin v. Lincoln Equipment Assoc., Inc.*, 888 F.2d 934, 937 (1st Cir. 1989); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 558 (1st Cir. 1989). Such a motion should be granted only if, as a matter of law, the evidence would lead a reasonable jury to only one conclusion — that the moving party was entitled to judgment. *Hendricks*, 923 F.2d at 214; *Austin*, 888 F.2d at 937; *Gutierrez-Rodriguez*, 882 F.2d at 558. In making this determination, the district court "'may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence.'" *Hendricks*, 923 F.2d at 214 (citations omitted). A denial of judgment n.o.v. is reviewed *de novo*; in reviewing the decision we utilize the same standards as those applied by the trial court. *Hendricks*, 923 F.2d at 214; *Austin*, 888 F.2d at 937.

The trial judge cannot act as a thirteenth juror but instead must review all the evidence in accordance with the standard articulated in the *Raymond* case. *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978). After considering all of the evidence in the light most favorable to the plaintiff, the

court finds that there was sufficient evidence from which a reasonable jury could find that the defendant was liable under the plaintiffs' negligence claim. Therefore, the court denies defendant's request to enter judgment as a matter of law.

The defendant requests that the verdicts for each plaintiff be remitted to zero based on the defendant's theory of inconsistent responses to the special verdict-questions. The court has previously addressed the inconsistency issue in this order and denies this request for the same reasons previously given.

The defendant objects to the awarding of prejudgment interest pursuant to New Hampshire Revised Statutes Annotated ("RSA") § 524:1-b. Interest is awarded in accordance with New Hampshire law and the defendant has presented no legal basis in support of its position that it should not be awarded. In any case which has been pending for a number of years and has been tried twice as this one has, the accruing of interest on any potential award of damages is a factor which the parties must weigh and consider when evaluating the benefits and risks of going to trial or settling the case. This claim is without merit.

Finally, the defendant claims that the jury's award of damages to each plaintiff was against the weight of the evidence and manifestly exorbitant and requests a remittitur or a new trial. In *Grajales-Romero v. American Airlines, Inc.*, 194 F.3d 288, 300 (1st Cir. 1999), the court stated:

> Pursuant to the federal rule, "[a] verdict should stand unless it is 'grossly excessive,' 'inordinate,' 'shocking to the conscience of the court,' or 'so high that it would be a denial of justice to permit it to stand.'" *Segal v. Gilbert Color Sys., Inc.*, 746 F.2d 78, 80-81 (1st Cir. 1984). Although the defendant faces a heavy burden in meeting this standard, excessive damage awards are not immune from review.

The jury had to weigh and consider a significant amount of conflicting evidence, concerning the nature and extent of Nathaniel's injuries and the economic losses associated with them, and the probable duration of Benjamin's life and his probable capacity to earn money had not his death occurred. In reviewing the evidence on damages, the court notes that the defendant did not call an economic expert witness but instead relied on cross-examining the plaintiffs' economic expert. Considering all of the evidence relevant to past medical expenses, and the nature and extent of Nathaniel's injuries and his economic losses, the court finds that there was sufficient evidence from which a reasonable jury could award Nathaniel damages in the amount of $8,917,335.27. Considering all of the evidence relevant to Benjamin's expenses, the probable duration of Benjamin's life, and his probable capacity to earn money, had not his death occurred, the court finds that there was sufficient evidence from which a reasonable jury could award Benjamin's estate damages in the amount of $1,290,960.70. Furthermore, the court cannot find that either the verdict was grossly excessive, inordinate, shocking to the conscience, or so high that it would be a denial of justice to permit it to stand. The defendant's request for a remittitur is denied.

Conclusion

Defendant's motions (document nos. 225, 226) are denied.

SO ORDERED.

/s/
Joseph A. DiClerico, Jr.
District Judge

June 6, 2001

cc: John J. Cronin III, Esquire

David P. Angueira, Esquire
Howard B. Myers, Esquire

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 01-2010

ELIZABETH TRULL,

Plaintiff.

NATHANIEL TRULL, BY HIS FATHER AND NEXT FRIEND OBO, DAVID TRULL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BENJAMIN TRULL,

Plaintiffs, Appellees,

v.

VOLKSWAGEN OF AMERICA, INC.; VOLKSWAGENWERK A.G., WEST GERMANY,

Defendants, Appellants.

Before

Boudin, *Chief Judge,*
Campbell, *Senior Judge,*
Torruella, Selya, Lynch, Lipez and Howard,
Circuit Judges.

ORDER OF COURT

Entered: February 11, 2003

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be *denied*.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

[cc: Mr. Angueira, Mr. Cronin, Mr. Cantor and Mr. Myers.]

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 01-2010

NATHANIEL TRULL, PPA DAVID TRULL AND DAVID TRULL, ADMINISTRATOR OF THE ESTATE OF BENJAMIN TRULL,

Plaintiffs, Appellees,

v.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN, AG,

Defendants, Appellants.

JUDGMENT

Entered: November 14, 2002

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Costs on appeal awarded to plaintiff.

By The Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

Certified and Issued
as mandate under
Fed. R. App. P. 41
Feb. 27, 2003

RICHARD CUSHING DONOVAN
Clerk

/s/_____
Deputy Clerk

[cc: Mr. Myers and Mr. Cantor.]

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

David Trull as Father and
Next Friend of Nathaniel Trull

v. Civil No. 94-15-JD

Volkswagen of America, Inc.
Volkswagen, A.G.

SPECIAL VERDICT FORM

Strict Liability

1. Do you find by a preponderance of the evidence that the 1986 Vanagon was defectively designed because it lacked lap/shoulder belts in the rear seating positions?

No
(Yes or No)

(If you answered "Yes" to question 1, answer question 2.)
(If you answered "No" to question 1, go to question 3.)

2. Do you find by a preponderance of the evidence that the defective condition caused, or substantially caused, injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

_____
(Yes or No)

* *

Negligence

3. Do you find by a preponderance of the evidence that the defendant was negligent in designing and/or testing the 1986 Vanagon because it lacked lap/shoulder belts in the rear seating positions?

Yes
(Yes or No)

(If you answered "Yes" to question 3, answer question 4.)
(If you answered "No" to question 3, skip question 4 and go to the bottom of this page for further instructions.)

4. Do you find by a preponderance of the evidence that the defendant's negligence in designing and testing the 1986 Vanagon caused or contributed to cause the injuries to Nathaniel Trull over and above those which were probably caused as a result of the original collision?

Yes
(Yes or No)

* *

Further Instructions

If you have answered "Yes" to question 1 *and* question 2, and/or question 3 *and* question 4, then proceed to question 5.

Otherwise, conclude your deliberations.

Allocation of Injuries

5. Do you find that the defendant has proved by a preponderance of the evidence which injuries were attributable to the initial collision and which to the design defect?

No
(Yes or No)

(If you answered "No" to question 5, go to question 6.)
(If you answered "Yes" to question 5, go to question 7.)

* *

Damages — Answer Question 6 *or* Question 7, as appropriate.

6. Assess the total amount of the damages sustained by Nathaniel Trull as a result of the accident in question.

Eight million nine hundred seventeen thousand
three hundred thirty five dollars and twenty-seven cents
(Words, not figures.)

(If you answer question 6, do not answer question 7.)

7. Assess the amount of damages sustained by Nathaniel Trull during the accident in question which are attributable to the design defect.

_____
(Words, not figures.)

(If you answer question 7, do not answer question 6.)

Date: April 20, 2001

/s/
Foreperson

APPENDIX F

EXCERPTS OF JURY INSTRUCTIONS

* * *

[R. 2467] As you know this case arises out of a collision which occurred on February 19th, 1991, in Conway, New Hampshire. Benjamin Trull and Nathaniel Trull were passengers in a 1986 Volkswagen Vanagon driven by their father, David Trull, when it collided with a 1979 AMC Concorde. Benjamin Trull was killed in the accident and Nathaniel Trull sustained injuries. One action is brought by David Trull as administrator of the estate of Benjamin Trull, and other action is brought by David Trull on behalf of his son, Nathaniel Trull. It is your duty to give separate, individual considerations to the claims made [R. 2468] by each plaintiff.

The plaintiffs claim that the defendant designed the 1986 Volkswagen Vanagon with a defect which rendered the vehicle defective and unreasonably dangerous. The plaintiffs claim that the 1986 Volkswagen Vanagon was defectively designed because it lacked lap/shoulder belts in each of the rear seating positions. The plaintiffs contend that as a result of this design defect, the vehicle was defective and unreasonably dangerous and that this condition caused or substantially caused injuries to Nathaniel Trull and the death of Benjamin Trull.

The defendant denies that the 1986 Vanagon was defectively designed as claimed and asserts that the vehicle was reasonably safe for its intended use.

The plaintiffs have the burden of proving their claims by a preponderance of the evidence.

The plaintiffs have asserted strict product liability and negligence claims against the defendant. However, they need not prove both claims to recover. They will be entitled to

recover if they prove one or the other of these claims. No claim is made by the plaintiffs for failure to warn or give notification of the alleged design defect. To the extent that there was any evidence relating to this [R. 2469] matter, you are to disregard it.

I will discuss each of the claims separately.

In order to prevail on their claim of strict product liability, the plaintiffs must prove by a preponderance of the evidence both of the following elements:

One, that the design of the 1986 Vanagon created a defective condition unreasonably dangerous to the plaintiffs; and,

Two, that the defective condition caused or substantially caused injuries to the plaintiffs over and above those which were probably caused as a result of the original collision.

A defect in design occurs when the product sold has been manufactured in conformity with the manufacturer's design, but the design itself presents unreasonable dangers to users. In making that determination, consider whether the design presents an unreasonable danger and the nature and extent of that danger, if any. Then you should consider the desirability and usefulness of the product to the public as a whole balanced against the risk of danger, the cost, and the practicality of reducing the risk of danger.

[R. 2470] Even if you decide that the product is desirable and useful to the public as a whole, consider whether the risk of unreasonable danger could have been reduced without significant impact on the effectiveness of the product and the cost of manufacturing. Liability may exist if the manufacturer did not take available and reasonable steps to lessen or eliminate the danger of even a useful or a desirable product. The manufacturer is not obligated to design the safest possible

product or a safer product or one as safe as others make, so long as the design that has been adopted is reasonably safe for the intended use of the product.

A product is not defectively designed or unreasonably dangerous merely because it is possible to be injured while using it.

The term "unreasonably dangerous" is not to be interpreted or applied in a manner that makes the manufacturer absolutely liable or an insurer of the product. A manufacturer is not required to guarantee that a product will not cause injury. What the manufacturer is required to do is to design, make, and sell a product which is free from defective conditions that are unreasonably dangerous to the user.

Even if the manufacturer has exercised [R. 2471] reasonable care in designing a product under the doctrine of strict product liability, the manufacturer is liable if the product as designed is defectively designed and unreasonably dangerous for its foreseeable uses.

In this case it has not been alleged or proved that any defect in the design of the 1986 Vanagon caused the accident to occur; that is, caused the two vehicles to collide with each other. What the plaintiffs have alleged is that the defendant is liable in strict product liability because the claimed design defect in the 1986 Vanagon caused or contributed to cause Nathaniel's and Benjamin's injuries to be more severe in this collision than they would have been — than they would have otherwise been had the defective design not existed.

This is a crashworthiness case in which the plaintiffs contend that severe injury and death were used by the claimed design defect in the 1986 Vanagon. Crashworthiness is the protection that a passenger motor vehicle affords its passengers

against personal injury or death as a result of a motor vehicle accident. Therefore you will be focusing on the design of the 1986 Vanagon involved in the collision. You will not be called upon to make any [R. 2472] legal judgments concerning the conduct of either driver because legal judgments about either driver are irrelevant to the issues you must decide in this case.

The plaintiffs have the burden of proving by a preponderance of the evidence that the 1986 Vanagon was defectively designed and that the defective design proximately caused injuries to the plaintiffs over and above those which were probably caused as a result of the original impact or collision. Under this theory the defendant is liable for the injuries to Nathaniel and Benjamin only to the extent that the claimed design defect was a proximate cause of enhancing, increasing, or worsening the injuries that they sustained over and above any injuries they probably would have sustained otherwise as a result of the impact or collision.

A legal cause of an injury is a cause which is a substantial factor in bringing about the injury.

In determining whether the conduct of the defendant caused or contributed to cause the injuries to the plaintiffs, you need not find its conduct was the sole cause of the injury, but only that it was a substantial factor in bringing about the injury even though other factors may have contributed to cause the [R.2473] injury.

Proximate cause is that which in the natural continuous sequence, unbroken by any efficient intervening cause, produces an injury without which the injury would not have occurred. An act or omission is not a proximate cause unless it played a substantial part in bringing about or actually causing the injury. An act or omission is not a proximate cause unless the injury is a direct result of the act or omission and would not

have happened but for the act or omission. If the injury would have occurred anyway without any defect in the design of the vehicle, then any design defect you find did exist would not be a proximate cause of the injury.

The plaintiffs have also alleged that the defendant was negligent because it failed to exercise reasonable care when it designed and tested the1986 Vanagon and that the Vanagon was not crashworthy. They contend that this failure resulted in the claimed defect in the vehicle; namely, the vehicle lacked lap/shoulder belts in each of the rear seating positions. The plaintiffs claim that defendant's negligence caused or contributed to the cause of their enhanced injuries.

The defendant denies the plaintiffs' claim [R. 2474] and contends that it exercised reasonable care in designing and testing the 1986 Vanagon and that the Vanagon was reasonably safe for its intended use.

In order to prevail on their claim of negligent design, the plaintiffs must prove by a preponderance of the evidence both of the following elements:

One, that the defendant failed to exercise reasonable care in designing and testing the 1986 Vanagon; and,

Two, that the defendant's failure to exercise reasonable care in designing and testing the 1986 Vanagon caused or contributed to the cause of the plaintiffs' injuries over and above those which were probably caused as a result of the original collision.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which the ordinary, prudent person or manufacturer would use under the same or similar circumstances. A failure to exercise reasonable care may result from either doing something that an ordinary, prudent person or

manufacturer would not do under the same or similar circumstances, or from failing to do something that an ordinary, prudent person or manufacturer would do [R. 2475] under the same or similar circumstances.

If a person or manufacturer fails to exercise such care as the reasonably prudent person or manufacturer under the same or similar circumstances, then that person or manufacturer is said to be negligent. On the other hand, if everything was done and nothing was left undone which the reasonably prudent person or manufacturer would have done and not left undone under the same or similar circumstances, then there is no negligence.

A manufacturer is under a duty to exercise reasonable care in designing and testing a vehicle, for those uses which could be reasonably foreseen, in order to avoid an unreasonable risk of injury to the occupants. When an unreasonable danger could have been eliminated without excessive cost or loss of product efficiency, liability may attach even though the use was intended or was unintended and reasonably foreseeable. The obviousness of the danger should be evaluated against the reasonableness of the steps which the manufacturer must take to reduce or eliminate the danger.

The plaintiffs allege that the defendant's negligence in designing and testing the 1986 Vanagon caused or contributed to the cause of their enhanced [R. 2476] injuries. The plaintiffs have the burden of proving by a preponderance of the evidence that the defendant was negligent in designing and testing the 1986 Vanagon and that the negligence was a proximate cause of their enhanced injuries. The defendant is liable for the injuries to Nathaniel and Benjamin if it was negligent as claimed and that negligence was a proximate cause of producing injuries over and above those which were caused as a result of the original impact or collision.

A legal cause of injury is a cause which is a substantial factor in bringing about the injury.

In determining whether the conduct of the defendant caused or contributed to cause the injuries to the plaintiffs, you need not find its conduct was the sole cause of the injury but only that it was a substantial factor in bringing about the injury even though other factors may have also contributed to cause the injury.

Proximate cause is that which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury without which the injury would not have occurred. An act or omission is not a proximate cause unless it played a substantial part in bringing about or actually causing [R. 2477] the injury. An act or omission is not a proximate cause unless the injury is a direct result of the act or omission and would not have happened but for the act or omission. If the injury would have occurred anyway without any defect in the design of the vehicle, then the design defect would not be a proximate cause of the injury.

Evidence has been introduced concerning various motor vehicle safety standards promulgated by an agency of the United States Government. Compliance with these standards may be considered by you as some evidence that the vehicle in question was not defective and unreasonably dangerous and that the defendant was not negligent in designing the Vanagon. However, such compliance is not conclusive or controlling on the issue of the defendant's liability in this case.

Compliance with an administrative standard does not present a finding of strict liability if, after considering all of the factors I have previously discussed with you concerning a defect in design, you find by a preponderance of the evidence that the design of the 1986 Vanagon created a defective condition

unreasonably dangerous to the occupants of the Vanagon. Likewise, compliance with an [R. 2478] administrative regulation does not prevent a finding of negligence if you find by a preponderance of the evidence that a reasonably prudent manufacturer would have taken additional precautions in order to avoid unreasonable risk of injury to the occupants of the Vanagon.

To the extent that you find from the evidence that the defendant had certain internal objectives and goals, you may consider compliance or noncompliance by the defendant with its own objectives and goals along with all of the other evidence in the case in determining whether or not the vehicle was defective and unreasonably dangerous in accordance with the previous instructions I have given you concerning strict product liability and negligence.

The defendant, which is a corporation, acts through its officers, agents, servants, and employees and acquires knowledge from all of these individuals. Therefore a corporation is presumed to know what these individuals know and the information that they have gained within the scope of their employment. Therefore the corporate defendant is chargeable with the combined knowledge of all of its officers, agents, and employees acquired within the scope of their employment and authority.

[R. 2479] As previously stated, the plaintiffs both under their strict liability and negligence claims, have the burden of proving by a preponderance of the evidence that the claimed design defect was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision. A plaintiff need not prove both claims in order to recover. It is sufficient if a plaintiff proves one or the other of the claims. If a plaintiff fails to meet his burden of

proof, you will conclude your deliberations as to that plaintiff. If a plaintiff does meet his burden of proof, then the burden shifts to the defendant to show with respect to each plaintiff by a preponderance of the evidence which injuries were attributable to the initial collision and which to the design defect. In other words, if a plaintiff makes a showing that the design defect was a substantial factor in producing injuries to the plaintiff over and above those which were probably caused or as a result of the original collision, then the burden shifts to the defendant to show which injuries are attributable to the initial collision and which to the design defect.

If the defendant fails to meet its burden on this issue of segregating the injuries between those [R. 2480] caused by the initial collision and those caused by the design defect, then all of the injuries are to be considered by you to be attributable to the design defect and therefore the responsibility of the defendant.

With respect to each plaintiff, first you will determine if that plaintiff has met his burden of proving by a preponderance of the evidence under his claim of strict liability or negligence that the claimed design defect was a substantial factor in producing injuries over and above those which were probably caused as a result of the original collision.

If the plaintiff fails to meet his burden on both claims, you will conclude your deliberations. If the plaintiff meets his burden on one or both of his claims, then you will take up the next issue, which is to determine which injuries were attributable to the original collision and which to the design defect. On this issue, as I have just explained to you, the defendant has the burden of proof, and if the defendant fails to meet this burden, then all of the injuries are to be attributed to the design defect.

Lastly, you will assess damages for each plaintiff for injuries sustained in the accident, [R. 2481] keeping in mind the following:

One, if the defendant has shown by a preponderance of the evidence which injuries were attributable to the initial collision and which to the design defect, then you will only assess damages for those injuries sustained by a plaintiff which are attributable to the design defect.

Two, if the defendant has failed to meet its burden of allocating the injuries between those caused by the initial collision and those caused by the design defect, then you will assess damages for all injuries sustained by the plaintiff due to the accident.

* * *

APPENDIX G

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered

pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

* * *

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.